STATE OF VERMONT
PUBLIC SERVICE BOARD

Investigation into (1) whether ENVY Nuclear Vermont Yankee, LLC, and ENVY Nuclear Operations, Inc., (collectively, "ENVY VY"), should be required to cease operations at the Vermont Yankee Nuclear Power Station, or take other ameliorative actions, pending completion of repairs to stop releases of radionuclides, radioactive materials, and, potentially, other non-radioactive materials into the environment; (2) whether good cause exists to modifiy or revoke the 30 V.S.A. § 231 Certificate of Public Good issued to ENVY VY; and (3) whether any penalties should be imposed on ENVY VY for any identified violations of Vermont Statutes or Board orders related to the releases.	)	Docket No. 7600 September 9, 2010

NEC'S REPLY BRIEF REGARDING THE BOARD'S JURISDICTION

The New England Coalition, Inc. ("NEC"), by and through its attorney Jared M. Margolis, hereby provides the following Reply Brief Regarding the Board's Jurisdiction in the above-captioned Docket.

1. Entergy Has Not Provided Any Valid Reason For The Board To Reexamine The Issue Of Preemption And They Are Precluded From Making These Arguments.

In the now dozens of pages that Entergy has submitted regarding preemption – including their Initial Brief and Supplemental Brief in this matter[1] – they have completely failed to provide any reason why the Board should alter its prior rulings on preemption or ignore the established precedent upon which the Board has previously ruled that they retain jurisdiction over matters that "do not relate solely to safety, but also … have land use or financial implications for the state." *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 64-65. NEC will not reiterate here its arguments regarding issue preclusion; however it is necessary,

[1] As well as Entergy's Motion to Modify the Prehearing Conference Memorandum and to Enlarge the Time to Respond to Pending Discovery Requests, which contained similar, albeit untimely, preemption arguments.

since Entergy provided supplemental arguments, to point out that they have still not provided any new arguments, case law or changes in the regulatory field since they made these same arguments in 2006 in Docket No. 7082, nor have they shown in any way that there are circumstances or reasons for the Board to alter its prior ruling on preemption in that docket. This issue has been previously decided by the Board in Docket No. 7082, against Entergy on the merits of these same arguments, and therefore Entergy is preempted from rearguing this matter under the doctrine of issue preclusion. *See* NEC's Initial Brief at 3-7.[2]

2. Entergy Continues To Confuse and Misuse The Applicable Supreme Court Precedent.

As is discussed in NEC's initial Brief, it is clear that Entergy has attempted to stretch existing precedent beyond reason, and has put forth a characterization of preemption that is unsupported by the case law that is cited in Entergy's own briefs. This is a fundamental matter, which requires detailed scrutiny by the Board, and therefore NEC must address it separately prior to moving on to respond to other issues raised in the parties' Briefs.

Entergy has attempted, without valid support and through misusing the language of the Supreme Court, to alter the well-settled precedent creating dual jurisdiction over nuclear power generation, and their faulty interpretation of the law would eviscerate the significant role that states continue to play regarding the regulation of nuclear power plants pursuant to *PG&E* and its progeny. The notion that any Board action which has a "direct and substantial" effect on decision-making with respect to the VY Station's construction and operations is preempted, as

[2] NEC notes that the Board has made its view of preemption clear in other previous dockets as well, and has been consistent in its rulings. *See i.e. Petition of Entergy Nuclear Vermont Yankee*, Docket 6812, Order re: Motion to Compel of 9/2/03 at 6 (stating that "while certain aspects of nuclear power regulation may be within the purview of the NRC, the Board retains authority to review potential economic impacts. This would include the economic impacts (as well as reliability and environmental) that may arise from changes to plant systems that ensure radiological safety").

Entergy has now repeatedly argued, blatantly ignores the actual language that the Supreme Court set forth in *English v. General Electric Co.,* 496 U.S. 72, 85 (1990) – the case that Entergy cites to for that proposition. Energy Brief at 1, 17.

The Court in *General Electric* actually stated that "state action will be preempted if it has a 'direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels,'" and the court went on to state that "this does not include 'every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities….'" *General Electric* at 85 (citations omitted – emphasis added). Entergy has failed to show how this docket, and specifically the types of Board actions that NEC set forth in its initial brief, would in any way affect radiological safety levels.

While this issue was covered in NEC's Initial Brief, after reading the other parties' Briefs NEC believes that it is important to reiterate here that Entergy's egregious misuse of the language from *General Electric*, and their attempt to misapply that language in an effort to alter the meaning of the Supreme Court's ruling on preemption, must not be tolerated. Other parties have seemingly fallen into Entergy's trap. For example, WRC stated in their Brief that:

> It is understood that the Board must yield to the Nuclear Regulatory Commission (NRC) on matters of nuclear health and safety where a ruling would conflict with NRC regulation or have a clearly established "direct and substantial" effect on nuclear plant construction or operation.

WRC Brief at 2 (emphasis added). Once again, this is absolutely NOT what the Supreme Court has annunciated, and it is incredibly important for the Board to base their analysis (should they choose not to rule that Entergy is precluded even from bringing these arguments) on the actual language used by the Supreme Court, which limits preemption to matters that concern

radiological safety levels, and therefore does not include any and all actions that would affect plant construction and operation generally, as Entergy asserts. *See General Electric* at 85.

The Department of Public Service (DPS), on the other hand, has included the correct operative language in its analysis, stating that the Board has jurisdiction "over a wide variety of matters pertaining to the operation of [] Vermont Yankee… so long as any action they take does not have a 'direct and substantial effect' on radiological safety matters regarding nuclear plant operations." DPS Brief at 1. This is consistent with the Supreme Court's language in *General Electric*, as noted above, as well as the Board's Order in Docket No. 7082, wherein the Board set forth its view of preemption, noting that "[t]his dual regulatory scheme extends even to matters related to nuclear materials, notwithstanding the broad preemption." *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 16. Entergy's interpretation is simply not supported by the Supreme Court's ruling, and the Board should therefore disregard Entergy's misleading and incorrect use of the language from *General Electric*.

NEC agrees with DPS that these proceedings are not preempted, and that a preemption analysis must be based on the specific actions the Board will take. NEC provided its proposals and has shown why those actions do not in any way affect radiological safety matters at VY. Therefore, these actions are not preempted, and this matter should move forward.

3. Responses to the Parties' Briefs

NEC is in general agreement with the arguments and analysis set forth in the Brief's of DPS, CLF, VNRC and WRC, all of which suggest that the Board is not preempted from continuing with this docket, and that certain actions in response to the leaks would not be preempted. DPS has set forth a very persuasive argument regarding the non-preempted statutory basis for the Board's continuing investigation into this matter, and very importantly points out

that the catalyst for this docket – the leak of radionuclides – "does not automatically preempt all action by the public Service Board." DPS Brief at 6. As DPS further notes, the Board may take action relating to the reliability of the plant, or the economic and land-use related impacts of the leaks, which are "legitimate areas of concerns and within the purview of the Board's regulatory authority." *Id*. at 7. NEC agrees with this analysis, and has set forth in its Initial Brief various actions the Board may take that are within the retained regulatory authority of the state.

NEC is further thankful to VNRC for bringing into this discussion a very important issue – in Vermont, groundwater is a public trust resource that has been granted certain statutory protections. There can be little doubt that the NRC has no regulatory authority to enforce or in any way oversee groundwater as a public trust resource, whereas the Board has an affirmative obligation, pursuant to Vermont statute, to protect our groundwater as a public trust resource. VNRC Brief at 4-6. State action to protect Vermont's groundwater resources does not in any way conflict with federal authority, since, as VNRC points out, "there is no federal groundwater law that protects and manages groundwater as a public trust resource." *Id*. at 11. The Board therefore has jurisdiction, and in fact an affirmative duty, to protect these resources.

While NEC agrees with the legal analysis provided by CLF and WRC, NEC is not specifically calling for VY to be shut down at this time, or for Entergy's CPG to be revoked. The precedent, however, suggests that should a review and assessment of the condition of underground/buried piping at VY, which NEC has called for, indicate that there are reliability concerns regarding imminent leaks and a likelihood of increased contamination from failing pipes, then ordering the plant to halt operations until these issues are resolved would be within the Board's jurisdiction due to the clear economic and land-use related concerns from such leaks.

NEC understands and agrees with the sentiments expressed by VPIRG regarding revocation of Entergy's CPG, which could put the state in a precarious position regarding oversight of VY. *See* VPIRG Brief at 1-2. An order that power generation cease, however, if predicated on valid economic and reliability concerns, would not be preempted pursuant to the case law and analysis provided by NEC and others. *See PG&E* at 205, 213.

a. Response to Entergy's Briefs

Entergy's claims and conclusions in their Initial and Supplemental Briefs are predicated upon a fundamental misunderstanding or misapplication of the applicable precedent regarding the dual federal/state regulatory jurisdiction over nuclear power plants, as noted above. Entergy claims that "the only facts submitted by the other parties all pertain to issues of radiological safety and to issues of plant construction and operation that implicate radiological safety," and that "no matter what the purpose of a state government in regulating radiological safety and the construction and operation of an existing plant… such regulations are preempted as a matter of law." Entergy Supp. Brief at 2. This is simply not the case.

First of all, several parties, including NEC and CLF, have submitted facts that confirm the Board's own sentiment, that "[i]t appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs." *Investigation into Entergy Nuclear Vermont Yankee*, Docket 7600, Order of 2/25/2010 at 8 (emphasis added). For example, Mr. Shadis specifically stated the potential costs of remediating the contaminated area at decommissioning, based upon his experience at Maine Yankee, and using Entergy's own testimony regarding the cost to remediate contaminated soil at the VY station. Testimony of Raymond Shadis 7/2/10 at 10. Mr. Shadis also provided specific facts pertaining to the concentrations of tritium at Maine Yankee in the groundwater several years after

decommissioning, which shows the potential land-use and economic consequences of the leaks at VY. Testimony of Raymond Shadis 7/2/10 at14. Mr. Shadis further provided testimony regarding NRC's role and oversight in these matters, indicating that NRC does not occupy this field, and that Vermont has distinct interests regarding groundwater contamination. Testimony of Raymond Shadis 7/2/10 at 5-9, 14-15. CLF's witnesses provided an incredibly thorough discussion of the harm that these leaks may be causing to the groundwater resources in and around VY, as did VNRC and WRC in their testimony and Initial Briefs, which discussed the potential environmental, economic and land-use consequences of the leaks and the harm to Vermont.

For Entergy to assert that such testimony falls short of providing facts upon which a showing can be made that there are non-preempted economic and land-use concerns at issue in this docket is disingenuous. Apparently, Entergy believes that the parties should have to show specific costs or other economic harms related to the leaks that are impossible to calculate without a full site survey. What they fail to understand is that at this point in the proceedings, with the limited information the parties have been given to provide arguments on preemption,[3] it is not possible to provide a more specific calculation of the economic and land-use related consequences of the leaks. That, however, will be undertaken in the following phases of this

[3] NEC must note that while the parties were provided an opportunity for discovery on these matters – which was supposed to help inform the parties regarding what exactly has taken place at the VY station in order to provide a basis for these preemption arguments – Entergy objected to almost every single question asked by NEC and the other parties, on the grounds that the matter was preempted. The information they did provide, over their objection, was in many cases incomplete, or else it was not possible to determine whether it was complete, since Entergy apparently feels that when providing discovery responses over an objection, they can provide whatever information they choose. Rather than pursue this discovery matter, which would have necessitated an extension to the briefing schedule, NEC has decided to work with the information that has been provided so that this matter would not be delayed further, which would be detrimental to the public good since timely action is required to protect Vermont's economic and environmental interests.

investigation. For now, all the Board is looking at is whether there are non-preempted concerns at issue, and potential responsive actions within the Board's jurisdiction, which the testimony and arguments discussed above clearly indicate to be the case.

Furthermore, the fact that these matters may "implicate radiological safety" is unsupported by the facts and is not the proper analysis for preemption. Entergy Supp. Brief at 2. NEC has set forth in its Initial Brief several actions the Board might take to remediate the harm caused by Entergy's failure to prevent and adequately respond to the contamination of public trust groundwater resources at the VY station. None of these actions in any way implicate radiological safety. Moreover, even if they did tangentially implicate radiological safety levels, but were not meant to directly control such matters, state action would still not be preempted. The Board made this clear in Docket 7082, stating that "[t]his dual regulatory scheme extends even to matters related to nuclear materials, notwithstanding the broad preemption." *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 16.

This is consistent with the Supreme Court's ruling in *General Electric*, which stated that only actions having a "direct and substantial" affect on radiological safety levels are preempted – NOT state actions that only implicate such concerns. *See General Electric* at 85 (stating that federal preemption "does not include 'every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities…'"). There is therefore a fundamental flaw in Entergy's analysis, and they have failed to acknowledge and consider this clear language from Supreme Court precedent that clearly contradicts their arguments.

Entergy also claims that "no matter what the purpose of a state government in regulating radiological safety and the construction and operation of an existing plant… such regulations are

preempted as a matter of law." Entergy Supp. Brief at 2. This statement is incredibly off-base and misleading. To begin with, the first half of the sentence is belied by the language of *General Electric*, wherein the Supreme Court specifically stated that "the *PG&E* Court 'defined the pre-empted field, in part, by reference to the motivation behind the state law.'" *General Electric* at 85. Therefore it is clear that contrary to Entergy's assertion, the purpose of the state action is germane, even central, to the preemption analysis.

Entergy's attempt to change the law of preemption in the second part of the sentence has already been discussed above – they continue to assert that any regulation of the construction and operation of a nuclear plant is preempted, however they are rearranging and changing the language used by the Supreme Court in *General Electric*, which specifically held that preemption only applies to state actions that have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* The corollary of this is that state action – even action concerning plant construction and operation – which does not directly and substantially affect radiological safety levels, is not preempted. Therefore, Entergy's claim that any state action affecting plant construction and operation is preempted as a matter of law is simply not true. The foundation of their argument is thus fundamentally flawed, and the Board must look beyond Entergy's attempts to alter clearly settled precedent to the specific language used by the U.S. Supreme Court, as set forth in greater detail in NEC's Initial Brief, and which supports the conclusion that the Board is not preempted from taken action to protect Vermont's interests in this docket.

Most significantly, Entergy has completely failed, both in its Initial and Supplemental Briefs, to undertake an analysis of how Board action would either conflict directly with NRC jurisdiction, or frustrate the purpose of any federal regulation. Entergy took great pains in their

Supplemental Brief to comb through the transcripts and prehearing orders in order to cherry pick statements regarding the need for the parties to show the potential harm that the leaks have caused – ignoring, of course, the Board's own statement that "it appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs,[4] – however it is their failure to provide any analysis on the most basic points regarding preemption that are indicative of the lack of support for their position.

The Board specifically stated that they are:

> not preempted from taking action in response to the leaks at Vermont Yankee, to the extent that the leaks may have economic and other non-radiological-health-and-safety consequences and to the extent that our action neither conflicts directly with NRC's exercise of its federal jurisdiction nor frustrates the purpose of the federal regulation.

Investigation into Entergy Nuclear Vermont Yankee, Docket 7600, Order of 2/25/2010 at 7 (emphasis added). Entergy has provided no argument, nor could they, that the Board's investigation would directly conflict with NRC jurisdiction or frustrate the purpose of any federal regulation. As NEC noted in its Initial Brief, even the NRC has stated that states do have a role to play regarding groundwater contamination, and there is nothing in the AEA or any NRC regulation that would indicate that the NRC has occupied the field of groundwater contamination, even from leaks of radionuclides, or that the Federal government has espoused a regulatory purpose that would be frustrated by the Board acting to protect Vermont's public trust groundwater resources, or by sanctioning Entergy for their violations of Vermont Law. Entergy has therefore failed to make a proper showing that there is any semblance of field or conflict

[4] *Investigation into Entergy Nuclear Vermont Yankee*, Docket 7600, Order of 2/25/2010 at 8 (emphasis added). The Board added that "Increased site contamination could also delay completion of the decommissioning process, which in turn could affect the future economic use of the site. These concerns do not fall within the preempted sphere of radiological health." *Id*. Testimony and arguments from NEC, CLF, WRC and VNRC confirm and support this.

preemption over these matters. The state continues to have a significant role to play in regulating VY, and this docket is not preempted pursuant to the applicable case law.

b. Response to IBEW

IBEW has provided no testimony in this docket,[5] but rather continues to submit motions to close the docket based on unsubstantiated and illogical arguments and incomplete information and half-truths. For example, they claim in their Brief that "the emergency has been cured," without providing any facts to support this claim or to counter CLF's testimony regarding ongoing aquifer contamination. IBEW Brief at 3. They further state that "the Nuclear Regulatory Commission… has been and is continuing to fully exercise its preemptive jurisdiction to the public interest benefit of Vermont for the safe operation of Vermont Yankee," *Id*., however they fail to understand that NRC oversight and enforcement relates solely to radiological and reactor safety, and does not encompass groundwater and aquifer contamination, or other off-site environmental impacts. Testimony of Raymond Shadis 7/2/10 at 5-9. Furthermore, NRC authority regarding decommissioning only pertains to the costs to remediate the site to the NRC designated millirem standards, and not to the more stringent standard that DPS and others (including NEC) have recommended, and does not cover the actions that are necessary to return the site to greenfield status, which Entergy has previously agreed to do, and which the Board has determined is in the public interest of Vermont.

The Board has made it clear that "[i]t appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs."

[5] In fact, IBEW has done nothing to contribute to the record in either Docket 7440 or 7600. Their participation has not added to the Board's understanding of the issues, and they have done nothing other than submit briefs that agree entirely with Entergy, thereby failing to meet the Board's rules regarding intervention, since their interests are fully represented and protected by another party – Entergy. *See* Board Rule 2.209.

Investigation into Entergy Nuclear Vermont Yankee, Docket 7600, Order of 2/25/2010 at 8 (emphasis added). The testimony provided by Raymond Shadis indicates that, based on his extensive experience with the decommissioning of Maine Yankee, decommissioning costs will increase due to these leaks, and the costs to remediate the area, while not capable of being accurately determined prior to a full site assessment, will be significant. Ordering Entergy to provide funds to address the increase in costs attributable to the tritium leaks necessary to return the site to Greenfield status is within the Board's jurisdiction to regulate economic concerns and is necessary to protect Vermont from potential shortfalls in the decommissioning fund. The NRC simply does not exercise complete jurisdiction over this issue, and therefore the Board can and must act to protect the economic interests of Vermont. IBEW's Brief provides no valid argument to the contrary.

IBEW's claims regarding Entergy's response to the leaks are likewise unsupported and unfounded. IBEW claims that Entergy has taken an "all hands on deck" approach; however they fail to provide any facts or testimony to contradict the testimony provided by NEC and CLF, whose experts have offered well-reasoned and supported arguments regarding Entergy's failures to act in a timely or adequate manner to protect Vermont's public trust resources – the threats to which should have been obvious to Entergy as much as two years ago with the presence of sink-holes in the AOG vicinity, which even NSA has said was a "missed opportunity" to find the leak a year or more before it was discovered.[6]

IBEW similarly claims that "completion of the corrective actions stated in the Root Cause Analysis Report now clearly can be assured. A Board order closing the docket can

[6] (See article dated May 28, 2010 – provided to the Board with NEC's Supplemental Response to International Brotherhood of Electrical Workers, Local 300's ("IBEW") Motion to Close Docket 7600)

reiterate and state such assurance." IBEW Brief at 4. This statement is belied by recent reports, on the VT DOH website, that Entergy is not on track to implement the Industry Groundwater Protection Initiative on-time,[7] and further exemplifies IBEW's failure to understand how Board authority and intervenor participation works. If the Board were to close the Docket based on the potential implementation of the GPI and other corrective actions stated in the Root Cause Evaluation (which NEC does not believe would be enough to protect Vermont's interests), then the Board would have little means of overseeing the implementation of these actions, and the parties would be unable to participate in ensuring that they were done correctly.

This is untenable, and would not be resolved by the Board reiterating these assurances in an order closing the docket. Once the docket is closed, the Board and the parties would no longer have the ability to review and comment on the implementation of these actions, and therefore such a statement by the Board would be meaningless and empty. It would also be a potential waste of resources, since the Board would have to reopen this docket, or create a new one, to review these matters should it become apparent that corrective actions are not being implemented correctly or in a timely manner. Closing the docket is not warranted at this time, and IBEW has completely failed to provide a sufficient factual or legal basis for their motion.

Regarding IBEW's analysis of applicable case law regarding preemption, it is somewhat perplexing that they begin with a rather lengthy passage from the Board's Order opening this docket, in which the Board provided its own lengthy quote from Docket No. 7082, wherein the Board "addressed its jurisdiction versus the NRC." IBEW Brief at 5. First of all, this language from Docket 7082 completely supports NEC's argument that this matter is precluded under the

[7] See http://healthvermont.gov/enviro/rad/yankee/tritium.aspx which states that "Vermont Yankee reported on August 26 that funding for four to five more groundwater monitoring wells has been approved by Entergy, but the start of drilling the wells is behind schedule."

doctrine of issue preclusion, since, as IBEW admits, the Board addressed this issue previously. *Id*. What is perplexing, however, is why IBEW believes that this quote supports their argument, which it clearly does not, especially given the fact that the Board specifically stated in that same order opening this docket that

> [i]t appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs. Increased site contamination could also delay completion of the decommissioning process, which in turn could affect the future economic use of the site. <u>These concerns do not fall within the preempted sphere of radiological health</u>.

Investigation into Entergy Nuclear Vermont Yankee, Docket 7600, Order of 2/25/2010 at 8 (emphasis added). IBEW suggests, without any factual support or explanation, that the Board's focus in Docket No. 7082 (which they repeatedly refer to as 6082) differs from the current situation; however this is simply not the case. In Docket 7082 the Board specifically stated that even though the storage of radionuclides at the VY station had obvious implications regarding radiological safety levels, the state retains jurisdiction under the dual regulatory scheme created by Congress, and that "[t]his dual regulatory scheme extends even to matters related to nuclear materials, notwithstanding the broad preemption." Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06 at 16.

The focus of the Board's actions in Docket 7082 were on the non-preempted economic and land-use concerns regarding radionuclide storage on-site, much like the focus of this docket concerns the non-preempted economic and land-use concerns regarding radionuclide leaks affecting public trust groundwater resources on and off-site. The focus is the same, and IBEW provides no facts or arguments that explain how the focus in this docket "reaches away from the Board's jurisdiction and more into the area of NRC jurisdiction." IBEW Brief at 7. In fact, as is set forth in NEC's Initial Brief, the facts in Docket 7082 seemingly provide more justification for

preemption, since that docket dealt with the storage of SNF – an issue over which NRC has clearly established jurisdiction – whereas groundwater contamination is not a matter that has been subject to as much NRC scrutiny or involvement. *See* NEC Initial Brief at 5, fn. 1.

Indeed, IBEW's citations to *PG&E* and their discussion of preemption support the conclusion that the Board is not preempted from proceeding with this docket, in total contradiction to their stated conclusions. As IBEW shows, on pages 7-8 of their Initial Brief, the Court in *PG&E* looked to the purpose of the applicable statute, to determine "whether it was aimed at economic matters within state jurisdiction or impermissibly intruded on the plenary jurisdiction of the NRC regarding concerning (sic) radiological matters." IBEW Brief at 7 (emphasis added). As IBEW notes, the Court found that there was an economic purpose for enacting the CA statute at issue, and therefore the state was not preempted. *Id*.

IBEW then provides the key to this issue: Pursuant to *PG&E*, "the Board must determine whether the releases concern 'safety' and 'nuclear' aspects of energy generation or whether the releases also involve economic questions." IBEW Brief at 8 (emphasis added). NEC agrees that this is the central question to the issue of preemption. Alas, the Board has already answered that question, stating that "[i]t appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs." *Investigation into Entergy Nuclear Vermont Yankee*, Docket 7600, Order of 2/25/2010 at 8 (emphasis added). The testimony provided by NEC, VNRC and CLF support this conclusion, and therefore according to IBEW's own analysis it is apparent that this matter is not preempted, and the Board retains jurisdiction to move forward with this docket.

Finally, IBEW claims that NEC's testimony fails to address "whether the releases address matters within the Commission's (sic) jurisdiction." IBEW Brief at 11. This confuses the

purpose of the testimony. Mr. Shadis' testimony was not, and could not, address whether these matters are within the Board's jurisdiction – that is a legal question that must be, and has been, analyzed and briefed by NEC's attorney. The purpose of the testimony was to present facts that inform the Board about the potential harms resulting from the leaks, and Mr. Shadis did exactly that by providing his expert opinion based on his experience (which goes well beyond the "grass-roots activity" that IBEW insultingly suggests[8]) regarding decommissioning costs and the potential economic ramifications of this incident. Mr. Shadis further discussed NRC's role in these matters, which does not, as IBEW suggests, mean in any way that this matter is preempted by NRC; rather, had they read Mr. Shadis' testimony carefully, IBEW would see that Mr. Shadis' comments on NRC involvement support the notion that they NCR has chosen not to occupy this field, and that the NRC has distinct interests from the state; therefore NRC involvement does not cover the economic and land-use concerns that are the basis for NEC's recommended non-preempted actions the Board should take in response to the contamination.

The testimony and arguments provided by NEC clearly show that there are various actions the Board may take that are not preempted. IBEW has provided nothing in their Brief to suggest otherwise, other than to make totally unsupported statements, such as that the testimony

[8] Mr. Shadis has previously submitted his CV, which shows his extensive experience in these matters, including participation in numerous NRC headquarters scoping meetings and technical issues workshops. Mr. Shadis has been a presenter in focus sessions at two NRC Annual Regulatory Information Conferences on topics including the NRC Voluntary Industry Initiatives Program, Decommissioning, Corrective Action Programs, Public Participation in NRC Activities, and the NRC Reactor Oversight Process. On four occasions Mr. Shadis has been invited to address a full meeting of the NRC Commissioners, briefing the Commissioners on his views of the Maine Yankee Independent Safety Assessment (1997), Spent Fuel Pool Accident Risk (2000, 2001), and the Reactor Oversight Process (2001). Mr. Shadis has further worked with the NRC on a Federal Advisory Committees Act (FACA) panel, regarding the Initial Implementation Evaluation Panel for the Reactor Oversight Process (ROP). Mr. Shadis' expert testimony on technical issues regarding VY has been accepted by the Board in several dockets. For IBEW to suggest that his experience is only as a grass-roots organizer is therefore totally erroneous and insulting.

provided by ANR, CLF and NEC "collectively demonstrates and underscores that the Board is preempted…." In fact, the testimony they refer to, as discussed above, shows that there are clear economic and land-use concerns at issue in this matter, and therefore pursuant to IBEW's own preemption analysis (as well as NEC's) the Board is not preempted from taking actions to address those concerns, which are within the states traditional and retained regulatory authority. *See* Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06 at 66 (citing *PG&E*, 461 U.S. at 205).

4. Conclusion

For the foregoing reasons, and those set forth in NEC's Initial Brief, the Board should find that Entergy is precluded from rearguing this matter, and that the actions NEC has recommended the Board take in response to the leaks are not preempted.

Dated at Jericho, Vermont this 9th day of September, 2010.

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